AUG 24 2000

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In The

Supreme Court of the United States

STEPHEN AMELKIN; DR. BRIAN CHRISTOPHER FEE; STUART LYON; NICHOLAS BAKER; DAVID KAPLAN; JAMES W. CHAMBERS; SIDNEY HANISH; RHODA DANIELS; THOMAS H. WATSON; KENNETH W. WALL; JAMES BOGARD,

Petitioners,

v.

ANN McCLURE, Document Custodian; GARY ROSE, Commissioner of Department of State Police; JUSTICE CABINET; DEPARTMENT OF STATE POLICE; and BEN CHANDLER, Attorney General for the Commonwealth of Kentucky,

AND

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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CITATION TO OPINIONS BELOW

The order of the United States District Court for the Eastern District of Kentucky entered April 28, 1995, granting in part a motion to transfer and a motion to remand to state court in Civil Action No. 95-CV-4, a case which was partially consolidated with the instant case in the Western District of Kentucky, is unreported and is reprinted in the appendix to this brief at 1a.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case, if remanded to the District Court as ordered by the Sixth Circuit Court of Appeals, might potentially be resolved by a construction in the state courts of Kentucky Revised Statute 61.878, which provides in pertinent part:

(1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery:

(a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. . . .

The full text of this statute is reproduced in the appendix at page 4a.

STATEMENT OF THE CASE

The Respondents adopt as their Statement of the Case the Sixth Circuit's introduction and "Factual Summary" below. (Pet. at 2a-3a; *Amelkin v. McClure*, 205 F.3d 293, 295 (6th Cir. 2000).)

Respondents further wish to bring two significant misstatements in the Petition to the Court's attention, inasmuch as they are relevant to a Statement of the Case. (1) The Sixth Circuit, on remand from this Court, did not merely make a "procedural retreat" (Pet. at 11) from its earlier decision affirming the District Court, but in fact *reversed* the District Court's facial invalidation of Ky. Rev. Stat. § 189.635 *on the merits*. (Pet. at 7a; *Amelkin v. McClure*, 205 F.3d at 297.) (2) Although the Petitioners allege that their "speech is directly restricted" by the statute at issue (Pet. at 5), the statute on its face does not restrict expressive speech but merely regulates access to government information.

REASONS FOR DENYING THE WRIT

I.

THE ISSUE IS NOT RIPE FOR REVIEW BECAUSE THE DISTRICT COURT DID NOT RULE ON AN "AS-APPLIED" CHALLENGE TO KRS 189.635.

The Petitioners purport to seek review from this Court on an "unconstitutional-as-applied" challenge to subsections (5) and (6) of Kentucky Revised Statute (hereinafter "KRS") 189.635. As the Circuit Court noted in its opinion, however, the District Court has not made any

findings of fact or conclusions of law regarding an "as-applied" challenge to the statute. (Pet. at 6a; *Amelkin v. McClure*, 205 F.3d at 296.) Rather, the District Court granted what the Petitioners originally sought: a facial invalidation of KRS 189.635. When the Sixth Circuit reversed that facial invalidation based on this Court's decision in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, ___ U.S. ___, 120 S.Ct. 483 (1999), it appropriately remanded the case to the District Court to make findings and conclusions as to any "as-applied" challenge the Petitioners might have raised below. (Pet. at 7a; *Amelkin v. McClure*, 205 F.3d at 297.)

No findings or conclusions appear in the District Court's opinions as to the manner in which KRS 189.635 has been administered. Likewise, there are no findings as to how, if at all, the statute has been applied to the Petitioners. The District Court does not mention what records were requested, by whom, from whom, in what manner, or for what purpose; what response, if any, was received, and when; what remedies were pursued; or whether any evidence was adduced to support a finding that KRS 189.635 has been enforced in a discriminatory, punitive, or otherwise unconstitutional manner. Without this basic information, it is not possible to rule on whether the Petitioners even have standing to bring an "as-applied" challenge to KRS 189.635, much less to rule on the merits of such an argument. The District Court must be given the opportunity to make its own findings and conclusions in the first instance.

The Circuit Court correctly declined to rule on any "as-applied" challenge before the District Court had an opportunity to pass on the question. Likewise, it would

be improvident for this Court to assume jurisdiction over any purported "as-applied" challenge before the issue has been properly developed by the lower courts. The Petitioners' request for review by this Court is entirely premature.

II.

ANY "AS-APPLIED" CHALLENGE TO KRS 189.635 TURNS ON THE PARTICULAR FACTS OF THIS CASE AND DOES NOT HAVE FAR-REACHING IMPLICATIONS.

Part of the nature of the argument that a statute is "unconstitutional as applied" is the limitation of a case's application to its own facts. When a statute has been challenged both on its face and as applied, and is found to be facially valid, the District Court must then consider "the evidence presented . . . insofar as it sheds light on the manner in which the statute is presently being administered." *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988). In particular, an "as-applied" challenge requires "focusing on the factual situation before us." *New York v. Ferber*, 458 U.S. 747, 768 (1982). *See also City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 758-59 (1988) (referring to "case-by-case nature of 'as applied' challenges").

If these Petitioners argue that KRS 189.635, though valid on its face, is being administered so as to affect them in an unconstitutional manner, such an argument turns solely on the particular facts of this case. As such, this case does not merit review by this Court, since it does not have far-reaching implications as to the constitutionality of KRS 189.635 or other similar statutes. Any

"as-applied" challenge should be resolved by the lower courts on its own facts.

III.

THIS CASE WILL BE REMANDED TO THE DISTRICT COURT IN ANY EVENT TO MAKE FINDINGS ON PETITIONERS' "AS-APPLIED" CHALLENGE TO KRS 61.874.

The Circuit Court not only ordered that the Petitioners' "as-applied" claim regarding KRS 189.635 should be remanded to the District Court for findings of fact and conclusions of law, but also ordered the same as to the Petitioners' "as-applied" challenge to KRS 61.874 (a section of the Kentucky Open Records Act). (Pet. at 6a-7a; *Amelkin v. McClure,* 205 F.3d at 296-97; *see also* Pet. at 28a-30a; *Amelkin v. McClure,* 168 F.3d 893, 901-02 (6th Cir. 1999).) The Petitioners did not seek review of the latter portion of the Circuit Court's order.

Since this case is to be remanded to the District Court for findings and conclusions in any event, it would not serve the interest of conservation of judicial resources for this Court to take jurisdiction of one portion of the case while another portion is remanded to the District Court. The entire case should be sent back to the District Court to make findings of fact and conclusions of law on the Petitioners' purported "as-applied" challenges to both KRS 189.635 and KRS 61.874, as ordered by the Sixth Circuit.

IV.

THE PETITIONERS' CHALLENGE TO KRS 189.635, AS ANALYZED BY THE LOWER COURTS THUS FAR, IS CONTROLLED BY THIS COURT'S RECENT DECISION IN *UNITED REPORTING*.

This Court previously remanded this case to the Sixth Circuit to be reconsidered in light of the decision in *Los Angeles Police Department v. United Reporting Publishing Corp.*, ___ U.S. ___, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999). (Pet. at 8a; *McClure v. Amelkin*, ___ U.S. ___, 120 S.Ct. 630 (1999).) The Petitioners, however, argue that the legal issues resolved by *United Reporting* remain unsettled. (Pet. at 11-16.) That argument is not plausible. If *United Reporting* did not apply to this case, there would have been no reason for this Court to have remanded it to the Sixth Circuit in the first place. Yet, now that the Circuit Court has duly reconsidered the case and found KRS 189.635 facially valid, the Petitioners argue that *United Reporting* has no application and should merely be ignored.

United Reporting stands for the proposition that a statute which merely limits access to government records, and does not prohibit speech, is not unconstitutional on its face. *Cf. United Reporting*, 120 S.Ct. at 489. A facially valid statute may be *applied* in an unconstitutional manner in a particular set of facts, as in the case of viewpoint discrimination. *Cf. United Reporting*, 120 S.Ct. at 491 (Ginsburg, J., concurring). The analysis of a statute's constitutionality *on its face*, however, is limited under *United Reporting* to the question of whether it actually prohibits

speech, or merely regulates access to government information.

A. The Petitioners' challenge to the statute on its face is a facial challenge, regardless of whether it rests on the "overbreadth" doctrine.

The analysis of KRS 189.635 by the District Court and the Circuit Court thus far has been entirely confined to the validity of the statute on its face. No court has yet made findings or conclusions about the manner in which the law was applied by any unit of government to any of the Petitioners in this case.

It is plain that this challenge by the Petitioners has been to KRS 189.635 on its face. The "face" of a writing is "[t]hat which is shown by the mere language employed without any explanation, modification, or addition from extrinsic facts or evidence." BLACK'S LAW DICTIONARY 704 (Rev. 4th ed. 1968). In this case, the Petitioners filed suit to enjoin implementation of the 1994 amendments to KRS 189.635 before the legislation even went into effect. (Pet. at 17a; *Amelkin v. McClure*, 168 F.3d at 897.) They obviously sought (and initially obtained) a ruling, based on "the mere language employed," that the statute was unconstitutional on its face.

Generally, a statute is facially invalid only when there is no set of circumstances under which it can operate constitutionally. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). If the law is capable of being applied in a constitutional manner, then it is not unconstitutional on its face. In that instance, a party raising a challenge must allege and prove an unconstitutional application; *i.e.*, that the

government has enforced the law in an unconstitutional manner under the facts of the particular case. *Id.* at 745 n. 3.

When a statute criminalizes and punishes expressive speech, however, there is an alternative theory under which it can be declared facially invalid; namely, the overbreadth doctrine. If the statute is substantially overbroad in its scope, a party whose speech is not constitutionally protected may seek a facial invalidation of the statute because of its tendency to threaten or deter the constitutionally protected speech of other persons not parties to the case. *Broadrick v. Oklahoma,* 413 U.S. 601, 612-15 (1973). The overbreadth doctrine thus represents an exception to the general rule that a statute will not be declared facially invalid if it is capable of being constitutionally applied in any circumstances. If the law is so overly broad that the threat of punishment creates a substantial deterrent to free speech, it can be held invalid on its face. *Id.*

If a party cannot show either that the law is overbroad or that it is incapable of constitutional application under any circumstances, then the only challenge remaining is to the manner in which the law was applied to that party. *Cf. Bowen v. Kendrick, supra,* at 621. In the instant case, the overbreadth doctrine was perhaps considered irrelevant by the Petitioners because they did not purport to bring their claim based on the free speech rights of others. Yet the Petitioners did invoke the traditional facial challenge: the argument that the statute inevitably placed an undue burden on protected speech. The Sixth Circuit rejected that argument in light of this Court's ruling in

United Reporting, as KRS 189.635 "does not restrict expressive speech, but simply regulates access to the state's accident reports." (Pet. at 6a; *Amelkin v. McClure*, 205 F.3d at 296.)

To complete its analysis under *United Reporting*, the Circuit Court further found the overbreadth doctrine unavailable to the Petitioners as an alternative basis for a facial invalidation, since the statute "does not carry the threat of prosecution." (Pet. at 6a; *Amelkin v. McClure*, 205 F.3d at 296.) Under either method of analysis, the statute was constitutional on its face. The Sixth Circuit therefore remanded the case for findings and conclusions as to whether KRS 189.635 was applied to the Petitioners in an unconstitutional manner.

B. This Court considered both traditional facial invalidation and the overbreadth doctrine in the *United Reporting* case.

In *United Reporting*, the respondents had attempted to have a California statute declared invalid on its face under both methods of analysis: both by arguing that it unduly burdened commercial speech (and was therefore incapable of constitutional application), and by arguing that it was overbroad. This Court first addressed the traditional facial challenge, holding that the statute was not wholly incapable of constitutional application, because it did not restrict speech, only access to government information:

> Petitioner contends that the section in question is not an abridgment of anyone's right to engage in speech, be it commercial or otherwise, but simply a law regulating access to information in the hands of the police department.

> We believe that, at least for purposes of facial invalidation, petitioner's view is correct. This is not a case in which the government is prohibiting a speaker from conveying information that the speaker already possesses. . . . The California statute in question merely requires that if respondent wishes to obtain the addresses of arrestees it must qualify under the statute to do so. Respondent did not attempt to qualify and was therefore denied access to the addresses. For purposes of assessing the propriety of a facial invalidation, what we have before us is nothing more than a governmental denial of access to information in its possession. California could decide not to give out arrestee information at all without violating the First Amendment.

United Reporting, 120 S.Ct. at 489 (citation omitted).

The Court went on to hold that the respondents in *United Reporting* could not rely on the overbreadth doctrine either, because the statute presented no threat of punishment to produce a deterrent or "chilling" effect on speech:

> To the extent that respondent's "facial challenge" seeks to rely on the effect of the statute on parties not before the Court – its potential customers, for example – its claim does not fit within the case law allowing courts to entertain facial challenges. No threat of prosecution, for example, . . . or cutoff of funds, . . . hangs over their heads. They may seek access under the statute on their own just as respondent did, without incurring any burden other than the prospect that their request will be denied.

> Resort to a facial challenge here is not warranted because there is "no possibility that protected speech will be muted."

Id. at 489-90 (citations omitted). Overbreadth was therefore not available to those respondents as an alternative basis for seeking facial invalidation of the California statute.

In the instant case, the Sixth Circuit held, in light of the first part of the holding in *United Reporting,* that KRS 189.635 was not invalid on its face. As for the second part of *United Reporting,* the statute was held not to be overbroad because it carried no threat of prosecution for expressive speech. (Pet. at 6a; *Amelkin v. McClure,* 205 F.3d at 296.) The Sixth Circuit therefore remanded the case to the District Court to determine on the basis of the record whether KRS 189.635 had been unconstitutionally applied to the Petitioners in this case. This is the "as-applied" challenge that remains to be considered, and should not be taken up by this Court until the courts below have been allowed to make findings and conclusions on the issue.

C. *United Reporting* is controlling because KRS 189.635 on its face does not restrict freedom of speech.

KRS 189.635 does not place any restrictions on the speech of the Petitioners, but merely controls access to government information. This is precisely the reason the California statute in *United Reporting* was held valid on its face: "This is not a case in which the government is prohibiting a speaker from conveying information that

the speaker already possesses. . . . [W]hat we have before us is nothing more than a governmental denial of access to information in its possession." *United Reporting*, 120 S.Ct. at 489. Similarly, KRS 189.635 merely limits access to information. If that information should be made public by the news media, the statute does not thereafter restrict its use in any way. *Cf. United Reporting*, 120 S.Ct. at 490 (Ginsburg, J., concurring).

Indeed, if there is any material difference between Kentucky's statute and California's, it is that KRS 189.635 is *less* burdensome on commercial speech. The statute at issue in *United Reporting* named a multitude of purposes for which access to arrest records was to be granted, including "a scholarly, journalistic, political, or governmental purpose, or . . . for investigation purposes by a licensed private investigator." *United Reporting*, 120 S.Ct. at 486 (quoting Cal. Govt. Code § 6254(f)(3)). This arguably had the effect of "den[ying] access to a small disfavored class." *Id.* at 492 (Stevens, J., dissenting).

By contrast, KRS 189.635 makes accident report information confidential except for its release "on a selective basis to a limited group of users who have a special, and legitimate, need for the information." *Id.* (Stevens, J., dissenting). This limited group includes only the parties to the accident and their guardians, attorneys, and insurers; as well as the news media, for the sole purpose of reporting the news. Since Kentucky's statute imposes less of an arguable burden on commercial speech than does California's – even under the theory unsuccessfully urged by the dissent in *United Reporting* – that case is clearly dispositive of the Petitioners' facial challenge.

It is the province of the District Court to determine, in the first instance, whether there has been evidence of viewpoint discrimination or any other unconstitutional application of this facially valid statute. This case must therefore be remanded to the District Court, as the Sixth Circuit ordered after thoroughly considering the record and the applicable law.

V.

THIS CASE CONTAINS CERTIFIABLE STATE-LAW ISSUES THAT MIGHT BE DISPOSITIVE.

It is a well-known principle of adjudication that constitutional questions should not be reached if an issue may be decided on narrower grounds. *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). In this case, the identifying information as to accident victims that KRS 189.635 makes confidential may also be protected from disclosure by another statute, KRS 61.878(1)(a), which creates a privacy exemption to Kentucky's Open Records Act. Excluded from disclosure are all "[p]ublic records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy." Such records are "subject to inspection only upon order of a court of competent jurisdiction." KRS 61.878(1).

If the information at issue is protected by this privacy exemption, then there exists an alternative basis on which a government agency might deny access to such records. The "as-applied" constitutional question regarding confidentiality under KRS 189.635 could, in that event, be

rendered moot and need not be reached by the federal courts.

This is a construction of state law that the District Court should arguably present for certification to the Supreme Court of Kentucky. "Warnings against premature adjudication of constitutional questions bear heightened attention when a federal court is asked to invalidate a State's law." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997).

The applicability of the privacy exemption, as set forth in KRS 61.878(1)(a), is necessarily decided on a case-by-case analysis. If the federal courts are to consider any "as-applied" constitutional challenge to KRS 189.635, the privacy exemption must also be involved in the analysis of the facts of this case. The Kentucky courts should therefore be given the opportunity to rule on the application of KRS 61.878(1)(a) before the "as-applied" constitutional issue is reached.[1] Accordingly, this matter must be

---

[1] Significantly, the Kentucky Attorney General's decision *In re David Kaplan/Louisville Division of Police*, 94-ORD-145, which the Petitioners cite as their only evidence that they ever made an "as-applied" challenge to KRS 189.635 (Pet. at 19-20), was never reviewed by the District Court below. Rather, the decision was appealed to the Franklin Circuit Court, the state court of competent jurisdiction; along with the appeal, a request was made for a declaratory judgment as to the facial constitutionality of KRS 189.635 and its relationship to a federal statute, 18 U.S.C. § 2721. That case was then removed by Petitioner Kaplan to the U.S. District Court for the Eastern District of Kentucky on the basis of the two federal questions. While the federal legal issues in that case (Civil Action No. 95-CV-4) were subsequently transferred to the Western District of Kentucky and consolidated with the instant case, the factual

remanded to the District Court to determine whether it is appropriate to seek certification of the state-law issue.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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issues constituting the direct appeal of the Open Records Decision were remanded to the Franklin Circuit Court, where they still remain on the docket. (*See* Appendix, at 1a.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 95-4

JUSTICE CABINET,
DEPARTMENT OF STATE POLICE,
and
CITY OF LOUISVILLE,
DIVISION OF POLICE, PLAINTIFFS,

V. **ORDER**

DAVID KAPLAN, ET AL., DEFENDANTS.

(Filed April 28, 1995)

* * *

This action is before the Court on a motion by the plaintiffs to remand it to the Franklin Circuit Court from whence it was removed [Record No. 5] and on a motion by the defendants to transfer it to the United States District Court for the Western District of Kentucky at Louisville. [Record No. 2]. Fully briefed, the motions are ripe for decision.

The plaintiffs seek, among other things, a declaration that KRS 189.635, as amended in 1994, is constitutional. They also seek a determination as to whether the amended version of KRS 189.635 is affected by the Driver's Privacy Protection Act of 1994, 18 U.S.C. § 2721. Although the plaintiffs now contend otherwise, their complaint clearly presents these two federal questions. Consequently, the defendants were entitled to remove these claims to this Court. 28 U.S.C. §§ 1441(a) and (b).

The plaintiffs' motion to remand will be denied insofar as it seeks declaratory relief on these two issues.

The Court recognizes that the plaintiffs also seek review of certain decisions made by the Attorney General of the Commonwealth of Kentucky pertaining to the defendants' requests for documents pursuant to the Kentucky Open Records Act. The Court agrees with the plaintiffs that these issues are not removable as they present no federal question. Consequently, this portion of the plaintiffs' complaint will be remanded to the Franklin Circuit Court. 28 U.S.C. § 1441(c).

The defendants' motion to transfer this matter to the Western District is based upon the existence of an action already pending in that district wherein the constitutionality of KRS 189.635 as amended is being challenged by them and others, *viz., Stephen Amelkin, et al. v. Jefferson County, Kentucky, et al.*, No. C-95-22-L-A. Although the plaintiffs oppose the motion to transfer, this Court believes that for the convenience of the parties and witnesses the defendants' motion should be granted. 28 U.S.C. § 1404(a).

Accordingly,

IT IS ORDERED herein as follows:

(1) That the plaintiffs' motion to remand [Record No. 2] be, and the same hereby is, **GRANTED** in part and **DENIED** in part.

(2) That the plaintiff's complaint, insofar as it seeks review of certain decisions of the Attorney General under the Kentucky Open Records Act be, and the same hereby is, **REMANDED** to the Franklin Circuit Court.

(3) That the defendants' motion to transfer the case to the Western District of Kentucky [Record No. 5] be, and the same hereby is, **GRANTED.**

(4) That the above-styled cause be, and the same hereby is, **TRANSFERRED** to the Western District of Kentucky.

This the 28th day of April, 1995.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
April 28, 1995

Case Number: 3:95-cv-00004

Lucy B. Richardson

Paul V. Guagliardo

William M. Radigan

Franklin Circuit Court Clerk

Certificate of Mailing by /s/ car.

61.878. Certain public records exempted from inspection except on order of court – Restriction of state employees to inspect personnel files prohibited.

(1) The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction, except that no court shall authorize the inspection by any party of any materials pertaining to civil litigation beyond that which is provided by the Rules of Civil Procedure governing pretrial discovery:

(a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

(b) Records confidentially disclosed to an agency and compiled and maintained for scientific research. This exemption shall not, however, apply to records the disclosure or publication of which is directed by another statute;

(c) 1. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which if openly disclosed would permit an unfair commercial advantage to competitors of the entity that disclosed the records;

2. Upon and after July 15, 1992, records confidentially disclosed to an agency or required by an agency to be disclosed to it, generally recognized as confidential or proprietary, which are compiled and maintained:

a. In conjunction with an application for or the administration of a loan or grant;

b. In conjunction with an application for or the administration of assessments, incentives, inducements, and tax credits as described in KRS Chapter 154;

c. In conjunction with the regulation of commercial enterprise, including mineral exploration records, unpatented, secret commercially valuable plans, appliances, formulae, or processes, which are used for the making, preparing, compounding, treating, or processing of articles or materials which are trade commodities obtained from a person; or

d. For the grant or review of a license to do business.

3. The exemptions provided for in subparagraphs 1. and 2. of this paragraph shall not apply to records the disclosure or publication of which is directed by another statute;

(d) Public records pertaining to a prospective location of a business or industry where no previous public disclosure has been made of the business' or industry's interest in locating in, relocating within or expanding within the Commonwealth. This exemption shall not include those records pertaining to application to agencies for permits or licenses necessary to do business or to expand business operations within the state, except as provided in paragraph (c) of this subsection;

(e) Public records which are developed by an agency in conjunction with the regulation or supervision of financial institutions, including

but not limited to, banks, savings and loan associations, and credit unions, which disclose the agency's internal examining or audit criteria and related analytical methods;

(f) The contents of real estate appraisals, engineering or feasibility estimates and evaluations made by or for a public agency relative to acquisition of property, until such time as all of the property has been acquired. The law of eminent domain shall not be affected by this provision;

(g) Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination before the exam is given or if it is to be given again;

(h) Records of law enforcement agencies or agencies involved in administrative adjudication that were compiled in the process of detecting and investigating statutory or regulatory violations if the disclosure of the information would harm the agency by revealing the identity of informants not otherwise known or by premature release of information to be used in a prospective law enforcement action or administrative adjudication. Unless exempted by other provisions of KRS 61.870 to 61.884, public records exempted under this provision shall be open after enforcement action is completed or a decision is made to take no action; however, records or information compiled and maintained by county attorneys or Commonwealth's attorneys pertaining to criminal investigations or criminal litigation shall be exempted from the provisions of KRS 61.870 to 61.884 and shall remain exempted after enforcement action, including litigation, is completed or a decision is made to

take no action. The exemptions provided by this subsection shall not be used by the custodian of the records to delay or impede the exercise of rights granted by KRS 61.870 to 61.884;

(i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;

(j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended;

(k) All public records or information the disclosure of which is prohibited by federal law or regulation; and

(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly.

(2) No exemption in this section shall be construed to prohibit disclosure of statistical information not descriptive of any readily identifiable person.

(3) No exemption in this section shall be construed to deny, abridge, or impede the right of a public agency employee, including university employees, an applicant for employment, or an eligible on a register to inspect and to copy any record including preliminary and other supporting documentation that relates to him. The records shall include, but not be limited to, work plans, job performance, demotions, evaluations, promotions, compensation, classification, reallocation, transfers, layoffs, disciplinary actions, examination scores, and preliminary and other supporting documentation. A public agency employee, including university employees, applicant, or eligible shall not have the right to inspect or

to copy any examination or any documents relating to ongoing criminal or administrative investigations by an agency.

(4) If any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination.

(5) The provisions of this section shall in no way prohibit or limit the exchange of public records or the sharing of information between public agencies when the exchange is serving a legitimate governmental need or is necessary in the performance of a legitimate government function.

(Enact. Acts 1976, ch. 273, § 5; 1986, ch. 494, § 24, effective July 15, 1986; 1992, ch. 163, § 5, effective July 14, 1992; 1994, ch. 262, § 5, effective July 15, 1994; 1994, ch. 450, § 34, effective July 15, 1994.)